

No. 47875-7II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

HARDER MECHANICAL, INC.,

Appellant,

v.

PATRICK A. TIERNEY, and DEPARTMENT OF LABOR
AND INDUSTRIES OF THE STATE OF WASHINGTON,

Respondents.

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BRIEF OF RESPONDENT

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I. Introduction

This is an appeal filed by Respondent Patrick Tierney's employer from a decision issued by the Pierce County Superior Court that affirmed a decision by the Board of Industrial Insurance Appeals that applied RCW 51.08.178(1) to calculate Mr. Tierney's wages. Mr. Tierney was injured in the course of his employment with Appellant, Harder Mechanical, Inc. on April 11, 2012.¹ The Department of Labor and Industries issued a wage order on December 12, 2012 setting Mr. Tierney's gross monthly wages pursuant to RCW 51.08.178(1).² Harder Mechanical protested the order.³ The Department reaffirmed the order on February 12, 2013.⁴ Harder Mechanical then appealed to the Board of Industrial Insurance Appeals.⁵ After a full hearing with live witnesses, the hearings judge affirmed the Department's wage order.⁶ Harder Mechanical then filed a Petition for Review with the full Board.⁷ The Board rejected the Petition for Review.⁸ Harder Mechanical then appealed to Superior Court. On July 24, 2015, the Superior Court affirmed the Board of Industrial Insurance Appeals decision. This appeal followed.

¹ CP 348.

² CP 81-82.

³ CP 82.

⁴ CP 82.

⁵ CP 82.

⁶ CP 57-66

⁷ CP 40-52.

⁸ CP 20.

There are special rules based on case law and Board decisions that apply to workers who obtain work from a union hall. The courts and the Board understand that these workers often work from one project to the next, and from one employer to the next. They often have gaps in their employment as they seek work between jobs. Despite the gaps in employment, they will be considered full-time workers so long as the type of work they perform is not itself essentially intermittent or part time, and so long as their intent is to work full time.

II. Statement of the Case

Mr. Tierney worked as a union plumber and pipefitter for approximately 35 years.⁹ He lives in Tacoma and at the time of his industrial injury was a member of United Associates, Local 26.¹⁰ An understanding of how a union hall operates is necessary to understand the issue on appeal and the legal precedent regarding the same. Mr. Tierney obtained his work assignments from the union hall. The union hall maintains a list (“dispatch list”) of members actively looking for work.¹¹ When an employer needs workers, they call the union dispatcher and provide information for the number of workers and specific skill sets they need for a project. The union dispatcher then refers to the dispatch list and calls the union member on the

⁹ CP 346, 396.

¹⁰ CP 396.

¹¹ CP 398-399; 227-230.

top of the list. A union member's position on the dispatch list is based on the date and time the member signed the list. The member who has been on the list the longest is at the top of the list, while the member who most recently signed the list is at the bottom. As a member gets called out to work, his or her name comes off the list, and everyone on the list moves up. The list is always rotating in this way. How long it takes for the list to "turn over" (how long it takes for the member on the bottom of the list to make it to the top), varies. It depends on how many members are on the list and how much work is available. After the 2008 recession, there was less plumbing and pipefitting work available, so the list would naturally take longer to turn over.¹² When it takes longer for the list to turn over, union members have longer periods of time when they are not working. When a union member is not working, he or she typically receives unemployment benefits.¹³

When union members sign the dispatch list, they check a box indicating which skill sets they have and what geographic zones covered by the local union that they are willing to work in.¹⁴ Local 26 has seven geographic zones covering western Washington from the Canadian border to the Oregon border, excluding King County.¹⁵ Union members are free to

¹² CP 436, 438-442, 480, 351, 381, 263, 280.

¹³ CP 418-419, 478-479.

¹⁴ CP 443-444, CP 498 (Exhibit 5).

¹⁵ CP 218.

select the zones that they are willing to work in.¹⁶ Mr. Tierney is skilled in two separate trades, plumbing and pipefitting. He checked both of those trades. He also checked all seven of the geographic zones while on the dispatch list, which shows his intent to work as much as possible.¹⁷

Union members can be dispatched from only one local union at a time.¹⁸ Union members can “pull their travel card” and seek work with a different local.¹⁹ If they do that, they will *not* be dispatched from their home local, Local 26 in this case.²⁰ As such, when a local member pulls his or her travel card to seek work in a different local that member may miss out on opportunities in their home local. Moreover, when a union member pulls his or her travel card, many burdens arise.²¹ The member must leave his or her residence and travel to another city, obtain and pay for lodging, pay to eat out, and make arrangements for mail, lawn care, pets, not to mention miss out on time with friends and family while the member is away. There is also no guarantee that the member will be dispatched to work in another local. In fact, traveling union members are placed on a sub-tier dispatch list (referred to as the B, C, or D list). Locals will only dispatch to a sub-tier list

¹⁶ CP 443-445, 223-224, 248.

¹⁷ CP 443-445, 428-429.

¹⁸ CP 452.

¹⁹ CP 191-192.

²⁰ CP 399.

²¹ CP 400-402.

only after everyone on the local list with the requested skill set (the “A” list) are working. Union members are not required by contract or law to seek work with a different local union when work is slow in their home local.²²

In this case, the evidence shows that Mr. Tierney was always either working full time through the union hall or seeking full-time employment by having his name on the dispatch list. When he was not working, he was collecting unemployment. His intent was always to work as much as possible. However, due to the economic recession there was less work available. This lack of work increased how long he remained on the dispatch list out of work. Tim Downes, the business agent for UA Local 26, testified that the union lost members during the recession due to lack of work.²³ There were plumbers on the dispatch list that had not received a work assignment for four years.²⁴ As he stated, “it’s been a very difficult economic downturn for us.”²⁵ A manpower report from Local 26 for the third quarter of 2011 showed that the union had an unemployment rate of 40 percent for pipefitters and 43 percent for plumbers.²⁶ Mr. Downes testified that UA Local 290 in Oregon also suffered from the recession.²⁷

²² CP 248.

²³ CP 436.

²⁴ CP 436.

²⁵ CP 436.

²⁶ CP 438-440.

²⁷ CP 454-455, 469 (Mr. Downes did say he would defer to a union member from Local 290 who is familiar with their work load. CP 472).

He also testified that it is difficult for a union member to maintain steady employment.²⁸ Another witness, Peter Honan, a union steamfitter from Local 26, testified that after the 2008 recession hit, there was limited work and his earnings suffered dramatically.²⁹

In the five years prior to Mr. Tierney's injury, he was dispatched to many jobs, some of long duration and some of short duration.³⁰ There were six occasions where Mr. Tierney accepted a job assignment fully intending to work the job, but for varying reasons, he was unable to.³¹ A list of his jobs and how the job ended is included in the record as Exhibit 2. There are certain specified categories to describe how the job ended. The classification include "job completion", "lay off", "turned back in", "failure to meet site requirements", "did not report", and "rejected".³² "Job completion" means the work ended because the job was completed.³³ Lay off typically means the job ended because of a reduction in force.³⁴ "Turned back in" means that the union member, after accepting the job, called dispatch back within 12 hours or more of the start time to report that for whatever reason he or she was unable to accept the assignment.³⁵ The reason

²⁸ CP 457.

²⁹ CP 480, 485.

³⁰ CP 490 (Exhibit 2).

³¹ CP 412-414.

³² See CP 490 (Exhibit 2).

³³ CP 234.

³⁴ CP 234.

³⁵ CP 230, 250-251.

could be anything, including being sick, having car trouble, having a doctor appointment that the member didn't realize when he or she accepted the job, having child care issues, etc. "Failure to meet site requirements" means that any of many pre-work requirements of the employer were not satisfied.³⁶ Employers often require members to perform a welding test before being accepted on the project. If a member fails the weld test, they are denied the job due to failure to meet site requirements. Some jobs require a good respirator fit, and if a member has facial hair, they will be denied the job. Employers sometimes require steel toed boots, and if a member shows up without them on, they will be denied the job. Some employers also require passing a urinalysis, and if a member fails the urinalysis, they will be denied the job. The classification of "did not report" means the union member was unable to accept the job for whatever reason, but did not give dispatch 12 hours advance notice of the inability.³⁷ This can occur when a member is sick or has car problems. "Rejected" means that the employer (contractor) or the jobsite owner rejected the worker for a reason other than failing a site requirement.³⁸ This could be the employer knows the worker and has a personality conflict with the worker or a variety of other reasons. If a job is terminated for "turned back in", the union member's position on the list is

³⁶ CP 232.

³⁷ CP 232.

³⁸ CP 233.

not affected; the member's position will be the same as it was before accepting the job.

In Mr. Tierney's case, of the six jobs he accepted and intended to work but was unable to, 2 were classified as "turned back in", two were for "did not report", one was "failure to meet site requirements", and one was for "rejected".³⁹ One of the "turned back in" jobs was from August 2, 2011. Mr. Tierney testified he had to turn that job back in because he injured his knee and had a doctor's appointment.⁴⁰ The job listed as "failure to meet site requirements" involved Mr. Tierney accepting a job on Fort Lewis, but his auto insurance had lapsed, which was a requirement to get on the base.⁴¹ As for the other did not report and turned back in jobs, the testimony shows that there are several legitimate reasons why a union worker may not be able to show up to a job, including sickness or having car trouble.⁴² Mr. Tierney provided unrebutted testimony that he never simply failed to show up to work without a valid reason.⁴³ Being sick and having transportation problems a few times in five years is not unusual and is to be expected.

³⁹ CP 490 (Exhibit 2).

⁴⁰ CP 408-410; *see also* CP 491 (Exhibit 3), which is the call log. Under the time entry of 8/16/11, the call log shows Mr. Tierney provided a doctor's note to get his name back on the dispatch list.

⁴¹ CP 414-415.

⁴² CP 411-412

⁴³ CP 413.

Mr. Tierney was incarcerated for four months during October 2011 through January 2012.⁴⁴ During that time he missed four dispatch calls. Two of the dispatch calls were for jobs that were cancelled the same day.⁴⁵ He was not available for work during this four month period.

Harder Mechanical called two company representatives from upper management to testify, Kevin Lucas and Jennifer Massey. These witnesses described an alleged abundance of work out of Local 290, in Oregon during the five years before Mr. Tierney's industrial injury on April 11, 2012.⁴⁶ They testified that the national recession essentially had no impact on the trades in Oregon. They testified that if Mr. Tierney wanted to work, he could have traveled to Oregon to work. However, they failed to produce any documentation to support their allegations, such as what Mr. Tierney produced in Exhibit 9. Mr. Lucas's testimony is particularly suspect as he didn't know the specifics of what qualified as a short call, showing his lack of understanding of the dispatch process.

Mr. Tierney testified that he intended to work as much as possible and tried to get work.⁴⁷ Mr. Downes testified that Mr. Tierney's actions of making himself available for two separate trades (plumbing and pipefitting)

⁴⁴ CP 363-364.

⁴⁵ CP 366-367, 416-417.

⁴⁶ CP 328-329 (Harder Mechanical's representative stating there was a "plethora" of work in Oregon during the global recession from 2008 to 2012).

⁴⁷ CP 405, 414, 415.

and making himself available for all seven geographic zones of Local 26, showed he was making himself employable as much as possible. Peter Honan, Tim Downes, and Phillip Dines testified that from all appearances Mr. Tierney wanted to work as much as possible.⁴⁸

III. Argument

A. Standard of Review

In industrial insurance cases, the superior court conducts a de novo review of the Board of Industrial Insurance's decision, but relies exclusively on the certified board record. RCW 51.52.115; *Watson v. Dep't of Labor & Indus.*, 133 Wn. App. 903, 909, 138 P.3d 177 (2006) (citing *Gallo v. Dep't of Labor and Indus.*, 119 Wn. App. 49, 53, 81 P.3d 869 (2003), *aff'd*, 155 Wn.2d 470, 120 P.3d 564 (2005)). The Board's findings and decision are prima facie correct and the party challenging the Board's decision has the burden of proof. *Id. Watson v. Dep't of Labor & Indus.*, 133 Wn. App. at 909 (citing *Gallo v. Dep't of Labor & Indus.*, 119 Wn. App. at 53-54).

The Court of Appeals reviews the superior court's decision under the ordinary standard of review for civil cases. *Id.* (citing RCW 51.52.140). The Court of Appeals reviews whether substantial evidence supports the trial court's factual findings and then reviews, de novo, whether the trial

⁴⁸ CP 481, 449, 250.

court's conclusions of law flow from the findings. *Id.* (citing *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999)). Substantial evidence will support a finding when the evidence in the record is sufficient to persuade a rational, fair-minded person that the finding is true. *Id.* (citing *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000)). Credibility determinations are solely for the trier of fact and cannot be reviewed on appeal. *Id.* (citing *Morse v. Antonellis*, 149 Wn.2d 572, 574, 70 P.3d 125 (2003)).

B. The Department, the Board, and the Superior Court correctly determined Mr. Tierney's gross monthly wages under RCW 51.08.178(1).

The court must liberally construe the Industrial Insurance Act, Title 51, "for the purpose of reducing to a minimum the suffering and economic loss arising from injuries...occurring in the course of employment. RCW 51.12.010. "In other words, where reasonable minds can differ over what Title 51 provisions mean, in keeping with the legislation's fundamental purpose, the benefit of the doubt belongs to the injured worker." *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 811, 16 P.3d 583 (2001). While the court may substitute its own view of the law for that of the Board of Industrial Insurance Appeals, the court is to give great weight to the Board's interpretation of the Act. *VanHess v. Dep't of Labor & Indus.*, 132 Wn.

App. 304, 315, 130 P.3d 902 (2006). The Board designates certain of its decision as “significant decisions,” which the courts consider persuasive, but not binding authority. RCW 51.52.160; *Stone v. Dep’t of Labor & Indus.*, 172 Wn. App. 256, 289 P.3d 720 (2012).

Substantial deference is also afforded to the agency’s interpretation of the law in those areas involving the agency’s special knowledge and expertise. *Puget Sound Water Quality Def. Fund v. Municipality of Metro. Seattle*, 59 Wn. App. 613, 617, 800 P.2d 387 (1990). Whether an agency’s construction of the statute is accorded deference depends on whether the statute is ambiguous. *Waste Management of Seattle, Inc. v. Utilities and Transp. Com’n*, 123 Wn.2d 621, 627, 869 P.2d 1034 (1994). Where an agency is charged with administration and enforcement of a statute, the agency’s interpretation of an ambiguous statute is accorded great weight in determining legislative intent. *Id.* (citing *Pasco v. Public Empl. Relations Comm’n*, 119 Wn.2d, 504, 507, 833 P.2d 381 (1992)). Here, the Department of Labor and Industries and the Board of Industrial Insurance Appeals are charged with administering and enforcing Title 51. There should be no question that RCW 51.08.178 contains ambiguities when determining when to use subsection (1) or subsection (2). Indeed, our Supreme Court has stated that these subsections are “potentially irreconcilable”. *Department of Labor & Indus. v. Avundes*, 140 Wn.2d 282, 287, 996 P.2d 593 (2000).

The issue in this case involves whether the Department and the Board used the correct method to calculate Mr. Tierney's wage order. How an injured worker's wages are to be calculated is addressed in RCW 51.08.178. There are four subsections to that statute, two of which are relevant here – subsection(1) and subsection(2). The statute provides in relevant part:

(1) For the purposes of this title, the monthly wages the worker was receiving from all employment at the time of injury shall be the basis upon which compensation is computed unless otherwise provided specifically in the statute concerned. In cases where the worker's wages are not fixed by the month, they shall be determined by multiplying the daily wage the worker was receiving at the time of injury:

(a) By five, if the worker was normally employed one day a week;

(b) By nine, if the worker was normally employed two days a week;

(c) By thirteen, if the worker was normally employed three days a week;

(d) By eighteen, if the worker was normally employed four days a week;

(e) By twenty-two, if the worker was normally employed five days a week;

(f) By twenty-six, if the worker was normally employed six days a week;

(g) By thirty, if the worker was normally employed seven days a week.

The term “wages” shall include the reasonable value of board, housing, fuel, or other consideration of like nature received from the employer as part of the contract of hire, but shall not include overtime pay except in cases under subsection (2) of this section. As consideration of like nature to board, housing, and fuel, wages shall also include the employer’s payment or contributions, or appropriate portions thereof, for health care benefits unless the employer continues ongoing and current payment or contributions for these benefits at the same level as provided at the time of injury. ...

(2) In cases where (a) the worker’s employment is exclusively seasonal in nature or (b) the worker’s current employment or his or her relation to his or her employment is essentially part-time or intermittent, the monthly wage shall be determined by dividing by twelve the total wages earned, including overtime, from all employment in any twelve successive calendar months preceding the injury which fairly represent the claimant’s employment pattern.

Subsection(1) of that statute is the default provision and must be used unless the employer proves subsection(1) should not apply. *Department of Labor & Indus. v. Avundes*, 140 Wn.2d 282, 290, 996 P.2d 593 (2000). Subsection(2), which allows the averaging of a claimant’s wages during a twelve month period predating the industrial injury, is only used when the employment pattern is exclusively seasonal in nature or the claimant’s current employment or his relation to employment is essentially part time or intermittent. RCW 51.08.178(2).

Our Supreme Court in *Avundes* adopted a two-prong test to determine when subsection(2) applies. The first prong is to look at the type

of work being performed to determine if it is essentially intermittent in nature. *Department of Labor & Indus. v. Avundes*, 140 Wn.2d at 290. If the work is intermittent in nature, the inquiry ends and subsection (2) applies. *Id.* If the work itself is not necessarily intermittent in nature, then the court turns to the second prong, which is whether the worker's relation to the work is intermittent.

The two prong test adopted by our Supreme Court in *Avundes* in the year 2000 was first articulated by the Board of Industrial Insurance Appeals in *In re John Pino*, BIIA Dec. 91 5072 (1994).⁴⁹ The Supreme Court cited the Board's *Pino* decision with approval and made the Board's test the law. The *Pino* case is extraordinarily analogous to Mr. Tierney's case. There, John Pino worked as a union-dispatched pipefitter for 20 years prior to his industrial injury. *Id.* Each job lasted an indefinite period, ranging from one day to several months. *Id.* After the job ended, Mr. Pino would place his name on the dispatch list to await his next work assignment. *Id.* Prior to Mr. Pino's employment with the employer of injury, he had been unemployed for two and one-half years due to a prior industrial injury. *Id.* The Board determined that pipefitting work was not part time or essentially intermittent. *Id.* The Board determined that Mr. Pino was working full time

⁴⁹ See opinion in record at CP 106.

in work “generally available on a continuous basis,” the nature of which constituted full-time employment. *Id.* The Board held that pipefitting work is construction work, which contemplates periods of unemployment while the worker seeks a new employer relationship when each project is completed. The Board stated:

Construction work, or any other work, that may require the worker to establish an employment relationship with several different employers, back-to-back or in succession, should be viewed as full time work. We do not believe the Department may speculate that a worker will not have work available continuously in the future, and based on such speculation, classify the worker as part-time or intermittent.

Id. The Board ruled that subsection (1) was the proper method for determining Mr. Pino’s monthly wages as a full-time worker.

Another analogous case; *In re Keith E. Craine*, Dckt. No 02 10033 (2002).⁵⁰ In *Craine*, the claimant worked in construction for 23 years, most recently as a journeyman carpenter. *Id.* He was typically hired by employers for project based work. *Id.* Mr. Craine testified, “[w]ell, the construction industry basically hires until the job is completed. And due to the high rate of pay, they let the – let you go and keep their minimum bones crew, if you will, and you go look for another job.” *Id.* He also testified this was not his pattern of employment when he was just a carpenter, not a journeyman

⁵⁰ This case is in the record at CP 116.

carpenter. He stated when he was just a carpenter, his work was “full time and consistent.” *Id.* “But, due to the present conditions in the industry, and trying to find a job at the current rate that I’m used to making, it makes it a lot more difficult and lot further out in trying to find a job.” *Id.*

At the time of injury on August 24, 2001, Mr. Craine was working for Lincoln Construction for a two month project. *Id.* Prior to finding the job with Lincoln Construction, Mr. Craine was unemployed and collecting unemployment. *Id.* The Department produced Mr. Craine’s Employment Security Records that showed he collected unemployment benefits until they were exhausted. *Id.* The records also showed he only earned \$9,196 in 1997, \$6,022.50 in 1998, \$11,055.76 in 1999, and \$20,723.80 in 2000. *Id.* He only worked 1,081 hours in 2000. *Id.* The employer confirmed that construction work goes on year-round and that it was not unusual to hire someone on a build-up of workers, and then keep them on for other jobs. *Id.* The employer also testified that it was not unusual for construction workers “to bounce from job-to-job, company-to-company, as the work comes and goes.” *Id.*

The Department argued that Mr. Craine did not seek all work that was available to him since he testified that regular carpentry work was available year-round, but he was only looking for journeyman carpentry work. *Id.* The Board rejected the Department’s argument, and noted the

argument did “not overcome the uncontroverted fact that the claimant was actively looking for work at the journeyman level and that he would consistently work if such employment was consistently available.”

The Department also argued that Mr. Craine would not be able to find work continuously in the future, so he should be considered a part-time or intermittent worker. *Id.* The Board rejected that argument, stating “[w]e do not believe the Department may speculate that a worker will not have work available continuously in the future and, based on such speculation, classify the worker as part-time or intermittent.” *Id. See also, In re Deborah Guaragna*, BIIA Dec. 90 4246 (1992) (holding “[w]e have found nothing in the legislative history or in the reading of RCW 51.08.178(2)(b) which suggests that the future availability of employment is an appropriate criteria to use in determining that the worker’s relationship to her current employment is essentially part-time or intermittent. ... We do not believe the Department may speculate that a worker will not have work available continuously in the future, and based on such speculation, classify the worker as “part-time” or “intermittent”).

The Board ruled that Mr. Craine was not an intermittent worker and that the Department should have used RCW 51.08.178(1) to determine his monthly wages. *Id.* In so ruling, the Board relied on the fact Mr. Craine intended to continuously search for work, the nature of his work required

him to seek serial employment with multiple employers, and his work history showed he actively searched for work.

Another case from the Court of Appeals that sheds light on the analysis is *Watson v. Dep't of Labor & Indus.*, 133 Wn. App. 903, 138 P.3d 177 (2006). In that case, the claimant, Robert Watson, worked as a grounds keeper for a golf course from spring until the fall. *Id.* at 907. When Mr. Watson would be laid off every fall, he would collect unemployment. *Id.* Mr. Watson sustained an industrial injury while working at the golf course. *Id.* The issue on appeal was whether the Department should have used subsection (1) or (2) of RCW 51.08.178 to determine his monthly wages. *Id.* at 907-08. The employer testified that it intended to hire Mr. Watson as a seasonal employee. *Id.* at 910. Mr. Watson testified that his intent was to work full time all year long. *Id.* at 909. The Court of Appeals applied the *Avundes* two-prong test and concluded that groundskeeper's work is not essentially intermittent because there were full-time groundskeepers at the golf course. *Id.* at 912-13. Applying the second prong of the *Avundes* test, the court found that two of the factors weighed in favor of finding Mr. Watson a full-time employee: his intent was to work full time and his job was not essentially intermittent. *Id.* at 913. The court found that he intended

to work full time due to the fact he collected unemployment benefits.⁵¹ The court noted that Mr. Watson's work history was ambiguous and did not have a history of serial employment. *Id.* at 913.

The Department argued that the court should focus on the claimant's objective work history over the worker's efforts to find full-time employment. *Id.* at 915. The court rejected that argument, noting that our Supreme Court also had rejected that argument in *Avundes*, where the court indicated that a purely objective analysis of work history was inappropriate. *Id.* See also, *In re Deborah Guaragna*, BIIA Dec. 90 4246 (1992) (holding "[w]hile past work history may have some relevance in understanding a worker's present or current relationship to his or her current employment, the mere fact that a worker may have a past history of part-time or intermittent work is insufficient, in and of itself, to classify a worker's current relationship to employment as part-time or intermittent. Other relevant factors, such as the worker's intent, as well as the nature or type of current employment, also bear on Mrs. Williams' [Guaragna] relationship to employment at the time of her industrial injury."). As the Supreme Court

⁵¹ "We can infer from the unemployment statutory scheme that there is a general requirement that individuals look for work in order to receive benefits. And because Watson testified that he received unemployment, a reasonable trier of fact could infer that he complied with the general requirement by looking for work. Therefore, substantial evidence supports the trial court's findings of fact that Watson was looking for work when not at the golf course." *Id.* at 911.

in *Avundes* stated, the law should not penalize “those who have had temporary bad fortune in finding a job.” *Id.* at 914 (citing *Avundes*, 140 Wn.2d at 289.). In *Watson*, the Department also argued that using subsection(1) of RCW 51.08.178 would give Mr. Watson “a windfall because his time loss compensation would exceed his yearly earnings for the three years he worked at the golf course.” *Id.* at 916. The Court of Appeals rejected the Department’s argument, stating “[w]e might also view him as a general laborer whose earning capacity was higher than he managed to actually earn the past three years. Because the legislature’s intent was to reflect a worker’s earning capacity rather than the worker’s average yearly salary, the Department’s arguments fails.” *Id.* The court held that Mr. Watson’s wages should be determined by using subsection(1) of RCW 51.08.178.

Here, applying the *Avundes* two-prong test shows the Department and the Board were correct to use subsection(1) of RCW 51.08.178 to calculate Mr. Tierney’s wages. Under the first prong (nature of work), it is undisputed that plumbing and pipefitting work is performed all year long. As such, the nature of the work is not seasonal or intermittent. The only issue challenged by Harder Mechanical is the second prong of the *Avundes* test: Mr. Tierney’s relationship to work. In deciding this issue, the court is to consider Mr. Tierney’s intent and his participation in or relationship to

the employment. *Department of Labor & Indus. v. Avundes*, 140 Wn.2d at 290 and *In re Pino*, BIIA Dec. 91 5072 (1994) at *4. It is undisputed that Mr. Tierney's profession provided project based work requiring him to find a new employer each time a project ended. Mr. Tierney testified that he intended to work as much as possible. Other indications of his intent include the fact that when he was out of work he always had his name on the dispatch list; he signed the dispatch list indicating he would work either of two distinct trades (plumbing and pipefitting); he made himself available to work in all seven geographic zones covered by Local 26; he kept his cell phone on him at all times as much as possible; and he collected unemployment when he was unable to find work.

As in *Avundes*, *Pino*, *Craine*, and *Watson*, Mr. Tierney had periods of unemployment between finding work with different employers. This was especially true during the economic recession that hit in 2008 and continued through the date of his industrial injury. When he was in between jobs, Mr. Tierney collected unemployment benefits. As the Court of Appeals made clear in *Watson*, collecting unemployment benefits shows an intent to work full time. Simply because Mr. Tierney worked out of a union hall during a global economic recession and had a difficult time finding work, does not show he had an intent to work part time or intermittently. As such, applying the *Avundes* two-prong test shows Mr. Tierney was not a seasonal, part-

time, or intermittent worker. The Department and Board were correct to calculate Mr. Tierney's monthly wages under subsection(1) of RCW 51.08.178.

C. Work history is not determinative of Mr. Tierney's relationship to work

Harder Mechanical argued that in looking at Mr. Tierney's work history, he did not engage in full-time continuous work. This argument has been considered and rejected by our Supreme Court and Court of Appeals. The Department raised that issue in *Avundes*, arguing a purely objective analysis of work history should be determinative of whether a claimant's relationship to work is full time or part time/intermittent. *Department of Labor & Indus. v. Avundes*, 140 Wn.2d at 289. Our Supreme Court rejected that argument:

There is no logical reason why a claimant should be penalized solely because his *prior* employment was irregular or uncontinuous. Such a rule would be unfair to an employee who had worked a series of jobs before being injured, and it would shift the analysis away from the proper focus on the injured worker's lost earning *capacity*.

Department of Labor & Indus. v. Avundes, 140 Wn.2d at 288 (quoting *Department of Labor & Indus. v. Avundes*, 95 Wn. App. 265, 276-77, 976 P.2d 637 (1999)).

The Department raised that work history argument again in *Watson v. Dep't of Labor & Indus.*, 133 Wn. App. 903 (2006). In that case, the Department argued that the court should focus on the claimant's objective work history over the worker's efforts to find full-time employment. *Id.* at 915. The court rejected that argument, noting that our Supreme Court also had rejected that argument in *Avundes*.

The analysis here should not focus on Mr. Tierney's work history, but all the relevant factors as discussed in the aforementioned case law. Mr. Tierney was always either working full time or seeking full-time work and collecting unemployment. His intent was to work full time, but during the recession, continuous work was difficult to find.

D. Being unable to work six jobs in five years does not show an intent to work intermittently

Harder Mechanical argued that because Mr. Tierney was unable to perform work on six jobs that he accepted, he must have lacked the intent to work full time. The employer also argued that Mr. Tierney missed four dispatch calls.⁵² Those calls were all made during the months Mr. Tierney was incarcerated and did not have access to his phone from October 2011

⁵² CP 465.

through January of 2012. Moreover, two of those calls were for jobs that were cancelled the same day.

Most workers will have occasions when they are ill and cannot show up to work or have car problems that prevent them from reporting to work. Mr. Tierney is no different than the average full-time worker. Having six occasions in five years where he was unable to report to work does not show an intent to not work full time. When he accepted these six jobs, he fully intended to perform the work. One of these occasions was due to an injured knee. Another was due to not having car insurance, and thus not being allowed on the job site (Fort Lewis). The others were most likely due to sickness and car trouble.

E. Being incarcerated for four months is not evidence of an intermittent relationship to work

Harder Mechanical argued that the fact Mr. Tierney was incarcerated for four months at one point in the past is evidence he that his relationship to work was intermittent. The fact that Mr. Tierney was incarcerated for four months, and therefore, missed some dispatch calls does not show an intent to not work full time. Mr. Tierney was incarcerated due to a crime of passion. Workers are not immune from the everyday challenges faced by many Americans. The fact Mr. Tierney made a poor decision in the heat of the moment does not reflect upon his intent to work

full time. While the incarceration did remove him from the work force for four months, he did not intend to be so removed. This was not a four month vacation. It was an involuntary confinement.

F. Determining Mr. Tierney's wage under subsection(1) as a full-time worker does not result in a windfall

Harder Mechanical argued to the superior court and hinted to the argument in its Appellant's Brief that the Department's and Board's method for calculating Mr. Tierney's wages will result in a windfall. The employer repeatedly argues that the wage order results in annual earnings of \$95,000, and Mr. Tierney never earned that much while he was working. This argument was raised and rejected by the Court of Appeals in *Watson*. A wage order dictates the amount of an injured worker's time loss compensation. As our Supreme Court stated, "this court has emphasized that an injured worker should be compensated not on an arbitrary set figure, but rather on his or her actual 'lost earning capacity'." *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 811, 16 P.3d 583 (2001). Here, the wage order on appeal found Mr. Tierney's monthly wages to be \$36.56 per hour, 8 hours a day, 5 days a week, totaling \$6,434.56 a month, plus the value of healthcare benefits paid for by his employer in the amount of \$1,496.00 per

month.⁵³ Mr. Tierney's earning *capacity* is \$95,000 a year, or more with possible overtime. The fact he may not have realized his earning capacity is immaterial. While one can look at this as a windfall, one could also look at Mr. Tierney and conclude that his earning capacity was much higher than what he actually earned in the 12 months prior to his industrial injury, which would give Harder Mechanical a windfall. As the court held in *Watson* rejecting a similar argument, "[w]e might also view him as a general laborer whose earning capacity was higher than he managed to actually earn the past three years. Because the legislature's intent was to reflect a worker's earning capacity rather than the worker's average yearly salary, the Department's arguments fails." *Watson v. Dep't of Labor & Indus.*, 133 Wn. App. At 916. Moreover, under the liberal construction mandate of the Industrial Insurance Act that requires all doubts to be resolved in the favor of the injured worker, any windfall should benefit the injured worker, not the employer.

G. An employer cannot speculate that the claimant will not be able to find full-time work in the future

Harder Mechanical argued to the Superior Court that because Mr. Tierney has a felony, he is unlikely to obtain full-time employment in the

⁵³ The amount that an employer pays for a worker's healthcare benefits must be included in the wage order. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 16 P.3d 583 (2001).

future. In case Harder Mechanical raises this issue in its reply brief, Mr. Tierney would like to address it. The Board has repeatedly held that speculation about the availability of future employment is not permitted in determining if an injured worker's monthly wages should be calculated under subsection(1) or (2) of RCW 51.08.178. *See, In re John Pino*, BIIA Dec. 91 5072 (1994) ("We do not believe the Department may speculate that a worker will not have work available continuously in the future, and based on such speculation, classify the worker as part-time or intermittent."); *In re Keith E. Craine*, Dckt. No 02 10033 (2002) ("We do not believe the Department may speculate that a worker will not have work available continuously in the future and, based on such speculation, classify the worker as part-time or intermittent."); *In re Deborah Guaragna*, BIIA Dec. 90 4246 (1992) ("We have found nothing in the legislative history or in the reading of RCW 51.08.178(2)(b) which suggests that the future availability of employment is an appropriate criteria to use in determining that the worker's relationship to her current employment is essentially part-time or intermittent. ... We do not believe the Department may speculate that a worker will not have work available continuously in the future, and based on such speculation, classify the worker as "part-time" or "intermittent").

Harder Mechanical's speculation about whether Mr. Tierney would have fewer job opportunities due to his criminal conviction is irrelevant and should not be considered.

H. The Industrial Insurance Act does not require workers to seek employment in other states to be considered intending to work full time

Harder Mechanical argued to the superior court that because Mr. Tierney did not use his union travel card and seek work outside the state of Washington, he must not have intended to work full time. This argument fails for several reasons. Nothing in the Industrial Insurance Act, or any other law or contract, requires a union member to seek employment in other states. To the contrary, WAC 296-19A-010(4) defines an injured worker's labor market as the labor market in which the worker was last employed and must be within a reasonable commuting distance from his home. The Board addressed the labor market issue in *In re Jeffrey R. Taylor*, Dckt. Nos. 11 10317 & 11 11713 (2012), and held that an injured worker who lived in the Tri-Cities area of eastern Washington did not have to take a job offered in the Auburn/Seattle area.⁵⁴ See also, *In re Rowdy Welch*, Dckt. No. 05 21623 (2007) (a job available in Arlington, Washington that was 328 miles away

⁵⁴ See CP 123.

from claimant's home was not within the claimant's relevant labor market.); *In re Jolee N. Hart*, Dckt. Nos. 08 11048 & 08 19845 (2009) (claimant had good cause to decline a job offer in Washington after she had relocated to Florida). It is anticipated that Harder Mechanical will argue that since Mr. Tierney occasionally took jobs in the past that were located in Bellingham, Washington, his labor market included the Portland area which is a similar distance from his home. The Board has considered and rejected a similar argument in *In re Darren P. Bowen*, Dckt. Nos. 11 22328, 11 24226 & 12 11428 (2013).⁵⁵ In *Bowen*, the board stated,

We have addressed the relevant labor market issue a number of times and have consistently concluded that where a worker takes a job that is further from home than a reasonable daily commute, the worker's labor market *continues to be the area within a reasonable commute of home*, not the area where he or she temporarily moved to accept employment.

Emphasis added. Mr. Tierney lives in Tacoma. As such, his labor market is any area that is a reasonable daily commute from Tacoma. Oregon is not a reasonable daily commute from Tacoma, so he had no obligation to seek work in Oregon to show his intent to work full time.

Additionally, the testimony taken in this case shows that to travel to another city is burdensome. The works must pay for his own lodging and

⁵⁵ See CP 128.

food while out of town. He or she has to make arrangement to take care of things at home. The worker also misses out on spending time with his family and friends. Traveling is an option, but not a requirement. Requiring union members to travel to other states to work before being considered a full-time worker under RCW 51.08.178 would have a huge impact on union workers in our State. It would result in every union worker who chooses not to travel to another state to work as being considered an “intermittent worker” under the Industrial Insurance Act. It would violate the liberal construction mandate. It would essentially drastically change the law as it now stands. Such a change should be left to the legislature, not the courts.

I. Mr. Tierney should be considered a full-time worker

It is anticipated that Harder Mechanical will argue that even if the court agrees with the Department and the Board that Mr. Tierney is not an intermittent worker; that the Department’s wage order is incorrect because the hours per day and days per week do not reflect the days Mr. Tierney normally worked. The law is already settled on this issue. The employer will likely request the court to average the number of days Mr. Tierney worked to determine how many days he “normally” worked. There is not a single case allowing this methodology in a case involving a worker who obtains work out of a union hall. The law holds that if a worker has to seek serial employment with gaps between employers, they are to be treated as

“full-time” workers. Full time is considered 8 hours a day, five days a week, which is how the Department and the Board calculated Mr. Tierney’s wage order. In *Pino*, the Board determined that Mr. Pino was working full time in work “generally available on a continuous basis,” the nature of which constituted full-time employment. *Id.* The Board held that pipefitting work is construction work, which contemplates periods of unemployment while the worker seeks a new employer relationship when each project is completed. The Board continued:

Construction work, or any other work, that may require the worker to establish an employment relationship with several different employers, back-to-back or in succession, should be viewed as *full time work*.

In re John Pino, BIIA Dec. 91 5072 (1994) (emphasis added). At the time of injury, Mr. Tierney was working 8 hour days.⁵⁶ When Mr. Tierney was working prior to that, he would work 8 or more hours per day.⁵⁷

IV. Conclusion

This Court should find that Harder Mechanical has not met its burden to show that the Superior Court erred in affirming the Board of Industrial Insurance Appeals’ calculation of Mr. Tierney’s wages. Mr. Tierney was a worker who sought work from a union hall. He worked as

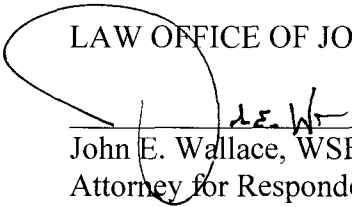
⁵⁶ CP 516 (Exhibit 13) (showing Mr. Tierney worked 24 hours for Harder Mechanical in April of 2012. The record also shows Mr. Tierney worked for Harder Mechanical in April of 2012 for three days. CP 349.

⁵⁷ CP 415-416.

much as he could. Unfortunately, the 2008 recession made it difficult to obtain continuous work. When he was on the dispatch list waiting for work he collected unemployment benefits. This case is nearly identical to *In Re Pino*, where the Board found a union pipefitter to be a full-time employee. The Court of Appeals and Supreme Court cited that case with approval and even adopted the test the Board created in *Pino*. Accordingly, the Superior Court correctly determine Mr. Tierney's wage order.

Respectfully submitted this 5ⁿ day of January, 2016

LAW OFFICE OF JOHN E. WALLACE, PLLC



John E. Wallace, WSBA #38072
Attorney for Respondent Patrick Tierney

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of January, 2016, a true and correct copy of the foregoing was sent:

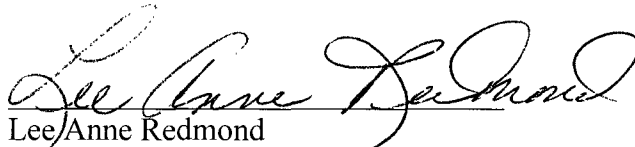
Via personal hand delivery to:

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